FILED
SEP 22 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 442

TWENTIETH CENTURY-FOX FILM CORPORATION, a Corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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TWENTIETH CENTURY-FOX FILM CORPORATION, a Corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Twentieth Century-Fox Film Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on June 29, 1956.

Citations to Opinions Below.

The findings of fact and conclusions of law and judgment of the District Court are unreported and are printed in Appendix C hereto, *infra*, p. 10. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 3, has not been reported as this petition goes to the printer.

Jurisdiction.

The judgment of the Circuit Court of Appeals was dated and entered on June 29, 1956. R. 45; Appendix B hereto, p. 3, *infra*. The jurisdiction of this Court is invoked under Chapter 646 of the Act of June 25, 1948, 62 Stat. 928; 28 U. S. C., Section 1254(1).

Question Presented.

Whether payments by a motion picture producer for the use of an airplane and services of a pilot for the purpose of aerial photography from air to air and from air to ground and for the purpose of selection from the air of suitable locations on the ground for the production of motion pictures are subject to the tax on transportation of persons imposed by Section 3469(a) of the Internal Revenue Code of 1939.

Statute Involved.

The statutory provision involved is Section 3469(a) of the Internal Revenue Code of 1939, 26 U. S. C. 3469(a). It is printed in Appendix A, *infra*, p. 1.

Statement of the Case.

The jurisdiction of the District Court was invoked because the case was a civil action against the United States for recovery of internal revenue tax alleged to have been erroneously and illegally assessed and collected. During the period commencing October 1, 1946, to August 1, 1949 petitioner employed Paul Mantz Air Services, hereinafter referred to as "Mantz," to render certain services to petitioner. Mantz furnished airplanes with pilots and petitioner used the airplanes for purposes of

photographing from the air various scenes in the course of production of motion pictures and for discovering or examining from the air locations on the ground suitable for the production of motion pictures. When the airplanes were used for purposes of photography from the air, the only person or persons in said airplanes, in addition to the pilot, were cameramen engaged in such photography. When the airplanes were used for purposes of discovery or examination of ground locations the only persons in the airplanes, in addition to the pilot, were employees of petitioner who were directly concerned with the suitability of such locations for the production of a particular motion picture, such as the producer, director, assistant director, production manager, art director and cameraman. The detailed facts concerning each flight involved appear in the opinion of the Circuit Court.

The charges by Mantz to petitioner were on an hourly or per mile basis without regard to whether any employee of petitioner was aboard the airplane. Transportation tax was paid on all of these charges, including charges for time when no employee of petitioner was in the airplane and when the airplane was not engaged in photography or observation.

The District Court found that none of the airplane flights involved the "transportation of persons" as that term is used in accordance with its ordinary meaning and common usage and as the term is used in Section 3469(a) of the Internal Revenue Code of 1939. The Circuit Court set aside the judgment of the District Court and remanded the case for entry of judgment in favor of respondent.

Reasons for Granting the Writ.

1. This case presents to this Court for the first time the proper meaning of the crucial term "transportation" in the statute imposing a tax on the transportation of persons. Because the statute involved was reenacted without material change in the Internal Revenue Code of 1954, Sections 4261-4264, the question presented is of current importance. This Court has held that "the words of a statute—including revenue acts—should be interpreted where possible in their ordinary, every day senses." *Crane v. United States,* 331 U. S. 1, 6, 67 S. Ct. 1047, 91 L. Ed. 1301, 1306 (1946). The Circuit Court, however, has in effect held that any movement of persons is transportation regardless of the reasons, purposes or nature of the movement. The result of this holding will, we believe, result in confusion and uncertainty in the application of the tax on transportation of persons.

2. The concentration of a substantial portion of the motion picture industry in and around Los Angeles, California indicates that the question presented will probably arise only in the District Court for the Southern District of California and that Circuit Courts other than the Ninth will not have an opportunity to pass upon this question. The tax problem involved, however, will constantly recur in the motion picture industry, as is shown by pendency of five additional suits in the District Court involving this same question.[1]

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[1] *Loew's, Inc. v. United States,* Civil No. 14244 PH; *Paramount Pictures Corp. v. United States,* Civil No. 14245 PH; *Samuel Goldwyn Productions, Inc. v. United States,* Civil No. 14246 PH; *Columbia Pictures Corp. v. United States,* Civil No. 14247 PH; *Warner Bros. Pictures, Inc. v. United States,* Civil No. 14248 PH.

This Court has deemed certiorari appropriate to determine an issue of importance to a particular industry, absent conflict between circuits, where as in the instant case the particular industry is so concentrated in a single circuit that it is unlikely a conflict between circuits will occur. (*Schriber-Schroth Co. v. Cleveland Trust Co.* (1938), 305 U. S. 47, 49, 83 L. Ed. 34, 36, 59 S. Ct. 8; *Muncie Gear Works v. Outboard M. & Mfg. Co.* (1942), 315 U. S. 759, 766, 86 L. Ed. 1171, 1177, 62 S. Ct. 865; *Exhibit Supply Co. v. Ace Patents Corp.* (1942), 315 U. S. 126, 128, 86 L. Ed. 736, 740, 62 S. Ct. 513.)

The Circuit Court's decision below, which was forecast in its earlier decision in *Getchell Mine Co. v. United States,* 181 F. 2d 987, does, moreover, conflict in principle with the decision of the Third Circuit in *Edward H. Ellis & Sons v. United States,* 187 F. 2d 648, 700 and of the Fourth Circuit in *Kerns v. United States,* 204 F. 2d 813, 815. The Third and Fourth Circuit Courts hold that when movement of property is an integral part of a taxpayer's business it is not "transportation" in its ordinary sense. The Ninth Circuit Court expressly rejected this test in its *Getchell Mine Co.* decision and in the subject case has now extended its minority viewpoint to the tax on transportation of persons. Decision by this Court is essential to a resolution of these conflicting rules.

Conclusion.

We believe it appropriate for the writ of certiorari to issue in order to enable this Court to establish a cornerstone in the construction of the term "transportation of persons" as used in the Internal Revenue Code, to decide an issue of great importance to the motion picture industry, to eliminate conflicting principles of taxation in the Circuits below and to eliminate the confusion which will otherwise arise in the application of the statute to other situations involving numerous taxpayers.

Respectfully submitted,

JOSEPH P. LOEB,

Attorney for Petitioner.

ALLEN E. SUSMAN,

DONALD T. ROSENFELD,

Of Counsel.

APPENDIX A.

Internal Revenue Code of 1939, Section 3469, Title 26 U. S. C. Section 3469, page 2990 (1946 Edition).

"Section 3469. Tax on transportation of persons, etc. —(a) Transportation.

"There shall be imposed upon the amount paid within the United States, on or after October 10, 1941, for the transportation, on or after such effective date, of persons by rail, motor vehicle, water, or air, within or without the United States, a tax equal to 10 per centum of the amount so paid. The tax shall not apply with respect to transportation any part of which is outside the northern portion of the Western Hemisphere, except with respect to any part of such transportation which is from any port or station within the United States, Canada, or Mexico to any other port or station within the United States, Canada, or Mexico. A port or station within Newfoundland shall not, for the purposes of the preceding sentence, be considered as a port or station within Canada. For the purposes of this section, the words 'northern portion of the Western Hemisphere' mean the area lying west of the thirtieth meridian west of Greenwich, east of the International Date Line, and north of the equator, but not including any country of South America. Such tax shall apply to transportation by motor vehicles having a passenger seating capacity of less than ten adult passengers, including the driver, only when such vehicle is operated on an established line."

Note: The second and fourth sentences were added by Section 8(a), Act of March 11, 1947, C. 17, 61 Stat. 12, effective as to amounts paid on or after April 1, 1947.

The third sentence was added by Act March 31, 1949, C. 46, 63 Stat. 30, effective as to amounts paid on or after April 1, 1949.

The War Tax Rate for the years involved herein was 15%, Section 1650, Internal Revenue Code of 1939, 26 U. S. C., Section 1650.

APPENDIX B.

Opinion of the United States Court of Appeals.

United States Court of Appeals for the Ninth Circuit.

United States of America, Appellant, vs. Twentieth Century-Fox Film Corporation, a Corporation, Appellee. No. 14,831.

June 29, 1956.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before Stephens and Fee, Circuit Judges, and Foley, District Judge.

Foley, District Judge.

The question upon this appeal is whether appellee is liable for federal transportation tax under §3469, Internal Revenue Code of 1939, imposing a tax on transportation of persons.

Appellant's statement of the case which was accepted by the appellee and which is in harmony with the Court's findings is as follows:

During the period October 1, 1946, to August 1, 1949, taxpayer employed Paul Mantz Air Services, hereinafter referred to as "Mantz," to furnish airplanes with pilots to enable taxpayer's employees to photograph from the air various scenes in the production of motion pictures and to enable them to discover or examine from the air locations on the ground suitable for the production of motion pictures. When an airplane was used to photograph scenes from the air, the only person or persons in the

airplane in addition to the pilot were taxpayer's cameramen engaged in such photography. When an airplane was used to discover or examine locations, the only persons in the airplane in addition to the pilot were taxpayer's employees who were directly concerned with the suitability of locations for the production of a particular motion picture, such as the producer, director, assistant director, production manager, art director and cameraman.

The charges, as to which the transportation taxes in dispute were paid, involved flights by airplanes under the following circumstances:

(a) Taxpayer engaged Mantz in connection with a sequence in the motion picture entitled "Sand," relating to a search by air for a valuable horse following his escape from a railroad car after a train wreck. Mantz furnished a model L-1-E airplane and pilot. The pilot flew alone in the airplane from Burbank, California, to Durango, Colorado, the scene of the motion picture company on location. At Durango taxpayer's cameraman entered the airplane and thereafter he took pictures from the air of the surrounding ground terrain and also of the horse. The cameraman left the plane at Durango and the pilot returned alone in the airplane to Burbank.

The flight by the pilot alone in the airplane from Burbank to Durango and return to Burbank took approximately 16 hours. The flying time consumed by the cameraman in aerial photography was approximately 7 hours and 35 minutes. Mantz charged the taxpayer $1,325 for this flight. The charge was on an hourly basis without regard to whether any of taxpayer's employees were aboard the airplane.

(b) In connection with taxpayer's production of the motion picture, "Chicken Every Sunday," Mantz furnished

taxpayer the same model L-1-E airplane and a pilot to carry taxpayer's cameraman to enable him to photograph from the air pictures of airplanes on the ground. The pilot flew alone from Burbank to Carson City, Nevada, where the cameraman entered the airplane. The pilot returned alone in the airplane to Burbank.

The total flying time was 10 hours and 35 minutes. Approximately 9 hours of the total elapsed time was consumed going to and returning from Carson City. Mantz charged taxpayer $750 for this flight. The charge was on an hourly basis without regard to whether any of taxpayer's employees were aboard the airplane.

(c) In connection with taxpayer's production of the motion picture, "Twelve O'Clock High," Mantz furnished taxpayers a model B-25 airplane and pilot to carry taxpayer's cameraman to enable him to photograph from the air pictures of other airplanes in flight. Mantz charged taxpayer $3,100 for this flight. The charge was on an hourly basis without regard to whether any of taxpayer's employees were aboard the airplane.

(d) In connection with taxpayer's production of the motion picture, "Willie Comes Marching Home," taxpayer desired to photograph a scene wherein an airplane would fly in one end of an airplane hangar, through the hangar, and out the other end. In order to find a hangar suitable for such purposes, Mantz furnished taxpayer a BT-13 airplane and pilot to carry taxpayer's cameraman. The pilot and the cameraman examined from the air hangars at three different airfields and made practice approaches at one hangar to be sure there were no obstacles at either end of the hangar to such a flight.

Mantz charged taxpayer $103.75 for this flight. This charge was based upon a total of 415 miles flown and at the rate of 25 cents per mile without regard to whether any of taxpayer's employees were abroard the airplane.

(e) In connection with taxpayer's production of the motion picture, "Yellow Skies," Mantz furnished taxpayer with a Cessna aircraft and pilot to carry taxpayer's employees to enable them to examine from the air possible ground locations suitable for photographing the production of this picture. Taxpayer's employees aboard the airplane for this purpose were the picture's producer, director, art director and cameraman, all of whose duties were directly related to the discovery and examination of locations as a possible site in the production of this motion picture.

Mantz charged taxpayer $75 for this flight. This charge was based upon an hourly rate and was without regard to whether any of taxpayer's employees were aboard the airplane.

(f) In connection with taxpayer's production of the motion picture, "Captain From Castile," Mantz furnished taxpayer with a DC-3 aircraft and pilot to carry taxpayer's employees to enable them to examine from the air possible ground locations in Mexico suitable for photographing various scenes in the production of this picture. Taxpayer's employees aboard the plane were the producer, director, assistant director, production manager, art director and cameraman, all of whose duties were directly related to the discovery and examination of locations as possible sites in the picture's production.

Mantz charged taxpayer $96 for this flight, which payment was without regard to whether any of taxpayer's employees were aboard the airplane.

Mantz collected from taxpayer $817.55 in transportation taxes, as provided by § 3469(a), for the above flights and paid this amount to the Collector of Internal Revenue for the Sixth California District, Taxpayer subsequently filed with the Collector a claim for refund of the taxes paid by it to Mantz. Following the Commissioner's rejection of its claim, taxpayer brought this action in the District Court below.

Smith v. United States, D. C. Florida, 1953, 110 F. Supp. 892, was cited by appellee as the only case upon the meaning of "transportation of persons" as used in § 3469. The reason for the Court's holding in the Smith case that the operation there under consideration was not transportation upon which a tax may be imposed under § 3469 is not made clear in the opinion and likewise, we are uninformed of the basis of the holding of the Court below—no opinion having been filed.

Appellee disclaims that it was contended in the District Court that the movements in this case did not constitute transportation because taxpayer's employees were picked up and discharged at the same point. Accompanying this disclaimer appellee makes what appears to be an inconsistent statement: "What we contend is that these flights did not constitute transportation within the meaning of Section 3469(a) because appellee's employees did not travel to go, or to go and come back from anywhere, that is, they had no destination as such."

The language of § 3469 clearly imposes a tax upon transportation of persons without regard to destination. If it was the intent of Congress to limit the application of the tax to transportation of persons from one point to another, a more cogent reason for the expression of such an intention existed than that which induced the framers

of § 3475 of the same Code to restrict the application of the tax upon transportation of property to transportation "from one point in the United States to another." That it was the purpose of Congress not to so limit the application of § 3469 is the interpretation of the Administrator charged with the enforcement of the Act. Treasury Regulations, 42 (1942 ed.), 26 C. F. R. § 130.51:

"* * * (d) It is not necessary that the transportation be between two definite points if not otherwise exempted; a payment for continuous transportation beginning and ending at the same point is subject to the tax."

This interpretation is reasonable and in harmony with the provisions of the section.

The fact that the Treasury Department may have also recognized or even attempted to create an exemption in favor of circus or show trains. Treas. Reg. 42, § 130.54, 26 C. F. R. § 130.54(f), has no bearing upon the question here. We are not called upon to decide whether the Administrator did or did not exceed his authority in promulgating such regulation.

The exemption made by § 3469(b) of application of the transportation tax to amounts paid for transportation by boat for the purpose of fishing from such boat was intended to apply to fishing trips without regard to whether a trip was "circular," that is, from point of origin back to that point, or whether such a trip might be to a point or points of destination. If any inference as to the possible intent of Congress, germane here, is to be drawn from the fishing boat exemption, § 3469(b), such inference would not support an implication that amounts paid for circular trips, such as we have here, are to be excluded

from the tax on transportation of persons imposed by § 3469(a).

Unlike the facts under consideration by this Court in Earle, Collector of Internal Revenue, v. Babler *et al.*, 9 Cir., 180 F. 2d 1016, the pilots were not employees of taxpayer. Nothing in this record would support a right on the part of taxpayer to discharge Mantz's pilots nor does it disclose that taxpayer paid the wages of the pilots. The circumstance that the times of departure and direction of the flights may have been as directed by appellee did not create the employee-employer relationship.

Mantz was engaged but for one purpose, to move by its airplanes employees of appellee and obviously, such movement was transportation in its ordinary sense.

Each of the above airplane flights involved the transportation of persons as that term is generally understood and as it is used in § 3469(a), Internal Revenue Code of 1939.

The judgment of the District Court is set aside and the case is remanded for entry of judgment in favor of the defendant, appellant here.

(Endorsed:) Opinion. Filed June 29, 1956.

Paul P. O'Brien, Clerk.

APPENDIX C.

United States District Court for the Southern District of California Central Division.

Twentieth Century-Fox Film Corporation, a corporation, Plaintiff, vs. United States of America, Defendant. No. 14249 PH.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The within cause came on regularly to be heard in the above entitled Court, the Honorable Peirson M. Hall presiding, without a jury, the jury having been waived by the parties hereto, plaintiff appearing by its attorneys Donald T. Rosenfeld, Allen E. Susman and Messrs. Loeb and Loeb by Donald T. Rosenfeld; and defendant appeared by its attorneys Laughlin E. Waters, United States Attorney and Bruce I. Hochman, Assistant United States Attorney; the facts having been stipulated by written stipulation on file herein between the parties through their respective attorneys; and the Court having duly considered the same and the briefs submitted by each of the parties hereto now makes its Findings of Fact and Conclusions of Law pursuant to Rule 52(a), Federal Rules of Civil Procedure for District Courts of the United States, as follows:

I.

The Court has jurisdiction over the subject matter of and parties to this proceeding.

II.

Plaintiff Twentieth Century-Fox Film Corporation at all times herein mentioned was and is now a corporation duly organized and existing under the laws of the State

of New York, with one of its principal places of business located in the County of Los Angeles, State of California, within the jurisdiction of this Court.

III.

During the period commencing October 1, 1946 to August 1, 1949 plaintiff employed Paul Mantz Air Services, hereinafter referred to as "Mantz", to render certain services to plaintiff. Said Mantz furnished airplanes with pilots and plaintiff used said airplanes for purposes of photographing from the air various scenes in the course of production of motion pictures and for discovering or examining from the air locations on the ground suitable for the production of motion pictures. When said airplanes were used for purposes of photography from the air, the only person or persons in said airplanes, in addition to the pilot, were cameramen engaged in such photography. When said airplanes were used for purposes of such discovery or examination the only persons in said airplanes, in addition to the pilot, were employees of plaintiff who were directly concerned with the suitability of such locations for the production of a particular motion picture, such as the producer, director, assistant director, production manager, art director and cameraman.

IV.

Mantz computed and collected from plaintiff Federal tax on transportation of persons provided under Internal Revenue Code Section 3469(a) in the sum of Eight Hundred Seventeen Dollars and fifty-five cents ($817.55) which was the tax alleged to be due in connection with the services described in the preceding paragraph.

V.

Mantz paid to the Collector of Internal Revenue of the Sixth California District the entire sum of Eight Hundred Seventeen Dollars and fifty-five cents ($817.55) collected from plaintiff, and neither the whole nor any part of said sum has been refunded to Mantz by defendant.

VI.

Plaintiff has not consented to the allowance of credit or refund to Mantz.

VII.

On or about the 19th day of March, 1951 plaintiff duly filed with the Collector of Internal Revenue at Los Angeles, California its claim for refund of said tax collected from it by Mantz and paid to the Collector of Internal Revenue. Said claim for refund was in the sum of Eight Hundred Seventeen Dollars and fifty-five cents ($817.55).

VIII.

On or about the 31st day of July, 1951 the Commissioner of Internal Revenue rejected said claim for refund in full.

IX.

No part of said sum of Eight Hundred Seventeen Dollars and fifty-five cents ($817.55) has been refunded or repaid by Mantz or by defendant to plaintiff.

X.

All of the charges here in issue involved flights by airplanes under the following circumstances:

(a) Plaintiff engaged Mantz in connection with a sequence in the motion picture entitled "Sand," relating

to a search by air for a valuable horse following his escape from a railroad car after a train wreck.

Mantz furnished a model L-1-E airplane and pilot. The pilot flew alone in the airplane from Burbank, California to Durango, Colorado, the scene of the motion picture company on location. At Durango plaintiff's cameraman entered the airplane and thereafter the cameraman took pictures from the air of the surrounding ground terrain and also of the horse. The cameraman left the plane at Durango and the pilot thereafter returned alone in the airplane to Burbank.

The flight by the pilot alone in the airplane from Burbank to Durango and return to Burbank took approximately 16 hours. The flying time consumed by the cameraman in aerial photography was approximately 7 hours and 35 minutes. Mantz charged plaintiff, and plaintiff paid the sum of One Thousand Three Hundred Twenty Five Dollars ($1,325.00) for this flight. The charge was on an hourly basis without regard to whether any employee of plaintiff was aboard the plane.

(b) In connection with plaintiff's production of the motion picture entitled "Chicken Every Sunday", Mantz furnished plaintiff the same model L-1-E airplane, referred to hereinabove, and a pilot to photograph from the air pictures of airplanes on the ground. The pilot flew alone in the airplane from Burbank to Carson City, Nevada, where plaintiff's cameraman entered the airplane to do photography from the air. The pilot returned alone in the airplane to Burbank.

The total flying time was 10 hours and 35 minutes. Of this approximately 9 hours was consumed going to and returning from Carson City. Mantz charged plaintiff

and plaintiff paid the sum of Seven Hundred Fifty Dollars ($750.00) for this flight. The charge was on an hourly basis without regard to whether any employee of plaintiff was aboard the plane.

(c) In connection with plaintiff's production of the motion picture entitled "Twelve O'Clock High" Mantz furnished plaintiff a model B-25 airplane and pilot to carry plaintiff's cameraman for purposes of photographing from the air pictures of other airplanes in flight.

Mantz charged plaintiff and plaintiff paid the sum of Three Thousand One Hundred Dollars ($3,100.00) for this flight. The charge was on an hourly basis without regard to whether any employee of plaintiff was aboard the airplane.

(d) In connection with plaintiff's production of the motion picture entitled "Willie Comes Marching Home", plaintiff desired to photograph a scene wherein an airplane would fly in one end of an airplane hangar, through the hangar, and out the other end. In order to find a hangar suitable for such purposes, Mantz furnished plaintiff a BT-13 airplane and pilot. The pilot and plaintiff's employee, a cameraman, examined from the air hangars at three different airfields and made practice approaches at one hangar to be sure there were no obstacles at either end of the hangar to such a flight.

Mantz charged plaintiff and plaintiff paid the sum of One Hundred Three Dollars and seventy-five cents ($103.75) for this flight. This charge was based upon a total of 415 miles flown and at the rate of 25 cents per mile without regard to whether any employee of plaintiff was aboard the airplane.

(a) In connection with plaintiff's production of the motion picture entitled "Yellow Skies", Mantz furnished plaintiff with a Cessna aircraft and pilot for purposes of examining from the air possible ground locations suitable for photographing the production of said picture. Plaintiff's employees aboard the plane for this purpose were the producer, director, art director, and cameraman of the picture. The respective duties and functions of each of said employees were directly related to discovering and examining said locations as a possible site in the production of such motion picture.

Mantz charged plaintiff and plaintiff paid the sum of Seventy Five Dollars ($75.00) for this flight. The charge was on an hourly basis without regard to whether any employee of plaintiff was aboard the airplane.

(f) In connection with plaintiff's production of the motion picture entitled "Captain from Castile", Mantz furnished plaintiff with a DC-3 aircraft and pilot for purposes of examining from the air possible ground locations in Mexico suitable for photographing various scenes in the production of said picture. Plaintiff's employees aboard the plane for this purpose were the producer, director, assistant director, production manager, art director, and cameraman of the picture. The respective duties and functions of each of said employees were directly related to discovering and examining said locations as possible sites in the production of such motion picture.

Mantz charged plaintiff and plaintiff paid the sum of Ninety-Six Dollars ($96.00) for this flight. Said payment was based upon a charge made without regard to whether any employee of plaintiff was aboard the airplane. Only a portion of the total payment by plaintiff

to Mantz in connection with this production is involved in this proceeding.

XI.

None of the airplane flights described in Paragraph X above involved the "transportation of persons" as that term is generally understood in accordance with its ordinary meaning and common usage.

XII.

None of the flights described in Paragraph X above involved the "transportation of persons" as that term is used in Section 3469(a) of the Internal Revenue Code of 1939, 26 U. S. C. Sec. 3469.

CONCLUSIONS OF LAW.

I.

Plaintiff is entitled to a judgment against defendant for the sum of Eight Hundred Seventeen and 55/100 Dollars ($817.55) together with interest at the rate of six percentum (6%) per annum from the date of payment to a date preceding the date of the refund check by not more than thirty days.

Dated: 4-1-55.

/s/ PEIRSON M. HALL.

Approved as to Form:

LAUGHLIN E. WATERS,
U. S. Attorney;
BRUCE I. HOCHMAN,
Asst. U. S. Attorney;

By /s/ BRUCE I. HOCHMAN,
Attorneys for United States of America.

Filed April 1, 1955.

United States District Court for the Southern District of California, Central Division.

Twentieth Century-Fox Film Corporation, a corporation, Plaintiff, vs. United States of America, Defendant. No. 14249 PH.

JUDGMENT FOR REFUND OF TAXES.

The within cause came on regularly to be heard in the above entitled Court, the Honorable Peirson M. Hall presiding, without a jury, the jury having been waived by the parties hereto, plaintiff appearing by its attorneys Donald T. Rosenfeld, Allen E. Susman and Messrs. Loeb and Loeb by Donald T. Rosenfeld; and defendant appearing by its attorneys Laughlin E. Waters, United States Attorney and Bruce I. Hochman, Assistant United States Attorney; the facts having been stipulated by written stipulation on file herein between the parties through their respective attorneys; and the Court having duly considered the same and having made its Findings of Fact and Conclusions of Law, NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff Twentieth Century-Fox Film Corporation shall have and recover from defendant the sum of Eight Hundred Seventeen and 55/100 Dollars ($817.55) together with interest at the rate of six per centum (6%) per annum from the date of payment to a date preceding

the date of the refund check by not more than thirty days.

Dated: 4-1-55.

/s/ PEIRSON M. HALL,
Judge.

Approved as to Form:
LAUGHLIN E. WATERS,
U. S. Attorney;
BRUCE I. HOCHMAN,
Asst. U. S. Attorney;
By /s/ BRUCE I. HOCHMAN,
Attorneys for United States of America.

Filed April 1, 1955.

Docketed and entered April 1, 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 442

TWENTIETH CENTURY-FOX FILM CORPORATION, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 15–23) are not officially reported. The opinion of the Court of Appeals (R. 39–44) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1956. (R. 45.) The petition for writ of certiorari was filed on September 22, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether amounts paid by the taxpayer to a common air carrier for flying its employees in airplanes

with pilots furnished by the carrier to various locations to enable these employees to take motion pictures from the air or to select locations suitable for the production of motion pictures and returning them to the point of departure are subject to the tax on the transportation of persons provided by Section 3469 (a) of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

The pertinent portion of Section 3469 of the Internal Revenue Code of 1939, as well as applicable provisions of Treasury Regulations 42, Sections 130.51, 130.52, 130.53, 130.54 and 130.59, is set forth in the Appendix, *infra,* pp. 11–13.

STATEMENT

The material facts, as stipulated by the parties (R. 8–15) and as found by the District Court (R. 15–22) and by the Court of Appeals (R. 39–42), may be summarized as follows:

During the period October 1, 1946, to August 1, 1949, taxpayer engaged Paul Mantz Air Services, hereinafter referred to as "Mantz," to furnish airplanes with pilots to enable taxpayer's employees to photograph from the air various scenes in the production of motion pictures and to enable these employees to discover or examine from the air locations on the ground suitable for the production of motion pictures. When an airplane was used to photograph scenes from the air the only person or persons in the airplane in addition to the pilot were taxpayer's cameramen en-

gaged in such photography. When an airplane was used to discover or to examine locations the only persons in the airplane in addition to the pilot were taxpayer's employees who were directly concerned with the suitability of locations for the production of a particular motion picture, such as the producer, director, assistant director, production manager, art director and cameraman. (R. 16–17.)

The charges, as to which the transportation taxes in dispute were paid, involved six flights by airplanes under the following circumstances. In all instances Mantz furnished an airplane and pilot. Generally, the pilot would fly alone in the airplane from Burbank, California, to an airport near the scene of the motion picture company on location, such as Durango, Colorado, or Carson City, Nevada. At this point, taxpayer's cameramen, or other employees would enter the airplane and be flown from there either to points from which they would take aerial photographs or to points from which they would examine possible ground locations suitable for the production of motion pictures. The cameramen or other employees would then be flown back to the airport at which they had boarded the airplane, and the pilot would then return alone in the airplane to Burbank. In all instances, Mantz charged taxpayer on an hourly or mileage rate based upon the kind of plane which was used. This rate was computed on the total elapsed time or distance flown from Burbank, California and was charged without regard to whether any of taxpayer's employees were aboard the airplane. (R. 18–22.)

Mantz collected from taxpayer $817.55[1] in transportation taxes, as provided by Section 3469 (a) of the 1939 Code, and paid this amount to the Collector of Internal Revenue. (R. 17–18.) Taxpayer subsequently filed with the Collector a claim for refund of the taxes paid by it to Mantz. (R. 18.) This claim was disallowed by the Commissioner. (R. 10.) The District Court held that none of the airplane flights involved the "transportation of persons" and granted a refund to taxpayer. (R. 22–23.) Upon appeal, the Court of Appeals reversed, holding that the flights did involve transportation of persons as that term is generally understood and as used in Section 3469 (a) of the Internal Revenue Code of 1939. (R. 39–44.)

ARGUMENT

The decision below is clearly correct. The issue raised by the petition for certiorari is not of general importance, and the case turns upon its particular facts. There is no conflict, and no occasion for further review.

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[1] As the petition points out, the transportation tax was paid on the total charges made by Mantz "including charges for time when no employee of petitioner was in the airplane" (Pet. 3). There is no issue, however, on the amount of the tax and the record fails to disclose any breakdown between charges for "deadhead service" and charges for carrying passengers. It is clear under the regulations that if Mantz had made separate charges the tax would be imposed only on charges for carrying passengers. Treasury Regulations 42 (1942 ed.) Sec. 130.54 (*h*) (5), App., *infra*, p. 13; cf. *Loew's, Inc.* v. *United States*, 99 F. Supp. 100 (S. D. Calif.). It is petitioner's contention that no part of the flights involved "transportation."

1. Section 3469 (a) of the Internal Revenue Code of 1939 (App., *infra*, p. 11) imposes a tax upon the amount paid within the United States for the transportation of persons by rail, motor vehicle, water, or air. Here taxpayer chartered airplanes from a common carrier, Mantz, in order to have its employees flown from Durango, Colorado, or other points, to places selected by taxpayer thereby enabling such employees to photograph from the air various scenes in the production of motion pictures or to discover from the air locations on the ground suitable for the production of motion pictures. After taxpayer's employees had concluded their work in these areas Mantz carried them back nonstop to the same point at which they had been picked up. The Court of Appeals correctly held (R. 44) that "Mantz was engaged but for one purpose, to move by its airplanes employees of appellee [taxpayer] and obviously, such movement was transportation in its ordinary sense" and "as that term is generally understood and as it is used in § 3469 (a), Internal Revenue Code of 1939."

Neither the 1939 Code nor the applicable Treasury Regulations 42 (1942 ed.) define the term "transportation". When Congress enacted in 1941 Section 3469 of the 1939 Code (Section 554 (b) of the Revenue Act of 1941, c. 412, 55 Stat. 687) that term had already acquired a well developed meaning, which included movements similar to those involved in this case. Cf. Sections 202 (a) and 203 (a) of the Motor Carrier Act, 1935, c. 498, 49 Stat. 543 (49 U. S. C. 1952 ed., Secs. 302–303), and Section 1 (10) and (21)

of the Civil Aeronautics Act of 1938, c. 601, 52 Stat. 973 (49 U. S. C. 1952 ed., Sec. 401). Under these provisions interstate movements similar to those involved in this case have been regulated as "transportation". In fact, under the provisions of the Civil Aeronautics Act, the very flights involved in this case were subject to regulation as "transportation." Furthermore, the legislative history of the enactment of Section 3469 (a) reveals that one of the main purposes in enacting a transportation tax was to discourage wartime travel and to conserve the nation's stock of gasoline, which of itself indicates that Congress intended to include as taxable transportation the movements which took place in this case. See 94 Cong. Record, Part 3, pp. 3137–3139; 95 Cong. Record, Part 14, p. A3545; Part 15, p. A4929; 96 Cong. Record, Part 1, pp. 894 and 1378, Part 2, pp. 1533–1534, Part 14, p. A1475.

Taxpayer's contention (Pet. 4), that the court below held that "any movement of persons is transportation regardless of the reasons, purposes or nature of the movement" is not correct. The court did not try to define the term transportation; instead it limited its decision to the facts of this case, and, upon these facts, held that Mantz was engaged for one purpose—to move by its airplanes taxpayer's employees. (R. 44.)

Apparently taxpayer does not here contend as it purportedly did below (R. 42) that because its employees were brought back to the same point from which they had been picked up the flight could not constitute transportation. A round trip is nonethe-

less a trip.[2] Essentially, it appears, taxpayer is contending (Pet. 4–5) that notwithstanding that its employees were carried to certain areas by Mantz, such movements should not be considered to be transportation when its employees were being carried for business reasons, or when its employees performed other functions while they were being carried in the airplane, such as the photographing of scenes from the airplane or the searching for locations. Such a contention completely overlooks the fact that, although taxpayer intended to have its employees carry out certain functions once they arrived over a certain place, taxpayer's prime purpose in chartering airplanes from Mantz was to have its employees carried from the place where they were picked up to these other localities in order to enable the employees to perform their functions. The fact that a passenger engages in work en route when traveling by air makes it no less transportation than would be the case where a passenger works on a train.

It is also clear that under the circumstances the taxpayer was not paying Mantz for aerial photo-

[2] See Treasury Regulations 42 (1942 ed.), Section 130.51 (App., *infra*, pp. 11–12), which provides that "a payment for continuous transportation beginning and ending at the same point is subject to the tax." Cf. Section 202 (a) and 203 (a) of the Motor Carrier Act, *supra;* Section 1 (10) and (21) of the Civil Aeronautics Act of 1938, *supra; Fordham Bus Corp.* v. *United States*, 41 F. Supp. 712 (S. D. N. Y.); *Western A. E., Grandfather Certificates*, 1 C. A. A. 39, 42; wherein the carriage of passengers by motor carriers, or by airplane, has been held to constitute transportation where a trip commences and ends at the same place without any pickup or discharge of passengers at any other point.

graphs or for advice as to locations for future film productions but was rather chartering a carrier to transport taxpayer's own employees to places where they could do those things. The amounts paid Mantz were computed solely on an hourly or mileage rate for the transportation service and had no relation to whatever other activities were carried out by taxpayer's employees while they were in the airplane.

2. Taxpayer does not allege any direct conflict with any other Court of Appeals. Taxpayer alleges, however (Pet. 5), a "conflict in principle" between the decision in the present case and the decisions of the Third Circuit in *Edward H. Ellis & Sons* v. *United States,* 187 F. 2d 698, and of the Fourth Circuit in *Kerns* v. *United States,* 204 F. 2d 813. We submit that *Ellis* and *Kerns* are clearly distinguishable from the present case. Both *Ellis* and *Kerns* involve the tax on the transportation of property under Section 3475 (a) of the Internal Revenue Code of 1939, *supra,* which applies only to point to point transportation of such property. In *Ellis* trucks moved earth within single premises which were being graded, and in *Kerns* trucks carried stone from a quarry pit some 500 feet to 3/10 of a mile to a rock crusher on the same premises. In both cases the courts held that such movements did not constitute point to point transportation, but were, instead a part of the grading and quarrying respectively.[3] Such movements are clearly distinguish-

[3] The Fourth Circuit also decided *Kerns*, *supra*, upon the additional ground that the truck drivers who were carrying the stone were subject to full control and direction by the quarry company and were the latter's servants or employees and not independent contractors, and therefore were not persons engaged in transporting property for hire, as required by Section 3475 (a).

able from those involved in the present case, where Mantz carried taxpayer's employees hundreds of miles and even into a foreign country (R. 21–22) so they could carry on their activities in these distant locations. Furthermore, the movements in the present case are more analogous to those which took place in *Getchell Mine* v. *United States,* 181 F. 2d 987 (C. A. 9th), and which the Ninth Circuit held constituted point to point transportation. Both the Third and Fourth Circuits in *Ellis* and *Kerns* accepted the test previously laid down by the Ninth Circuit in *Getchell Mine* as to what constitutes point to point transportation, but distinguished their cases on the particular facts involved therein.

3. The petition itself shows (Pet. 4) that the question raised is of limited importance and turns upon an analysis of the particular facts involved. Consequently, no valid reason has been presented for review by this Court of the decision of the Court of Appeals.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1956.

APPENDIX

Internal Revenue Code of 1939:

SUBCHAPTER C—TRANSPORTATION OF PERSONS

SEC. 3469. TAX ON TRANSPORTATION OF PERSONS, ETC.

(a) [As added by Sec. 554 (b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, and as amended by Sec. 609 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798.] *Transportation.*—There shall be imposed upon the amount paid within the United States, on or after October 10, 1941, for the transportation, on or after such effective date, of persons by rail, motor vehicle, water, or air, within or without the United States, a tax equal to 10 per centum of the amount so paid. Such tax shall apply to transportation by motor vehicles having a passenger seating capacity of less than ten adult passengers, including the driver, only when such vehicle is operated on an established line.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3469.)

Treasury Regulations 42 (1942 ed.):

SEC. 130.51. *Scope of Tax.*—Section 3469 (a) imposes a tax upon payments of more than 35 cents made in the United States on or after October 10, 1941, for transportation of persons, on or after such date, by rail, motor vehicle, water, or air.

* * * * *

The purpose of the transportation, whether business or pleasure, is immaterial.

It is not necessary that the transportation be between two definite points. If not otherwise exempt, a payment for continuous transportation beginning and ending at the same point is subject to the tax.

The tax accrues at the time payment is made for the transportation, irrespective of when the transportation is furnished.

The tax is payable by the person making the taxable transportation payment and is collectible by the person receiving such payment. * * *

* * * * *

SEC. 130.52. *Rate and Application of Tax.*—* * *

The tax is measured by the total amount paid, whether paid at one time or collected at intervals during the course of a continuous transportation, as in the case of a carrier operating under the zone system.

The tax is determined by the amount paid for transportation with respect to each person. Thus, where a single payment is made for the transportation of two or more persons, the taxability of the payment and the amount of the tax, if any, payable with respect thereto, must be determined on the basis of the portion of the total payment properly allocable to each person transported.

Where a payment covers charges for nontransportation services as well as for transportation of a person, such as charges for meals, hotel accommodations, etc., the charges for the nontransportation services may be excluded in computing the tax payable with respect to such payment, provided such charges are separable and are shown in the exact amounts thereof in the records pertaining to the transportation charge. If the charges for nontransportation services are not separable from the charge of transportation of the person, the tax must be computed upon the full amount of the payment.

SEC. 130.53. *Payments for Transportation Subject to Tax.*—The following are examples of taxable payments for transportation. * * *

(*i*) *Chartered conveyances.*—An amount paid in the United States for the charter of a special

car, train, motor vehicle, aircraft, or boat for transportation purposes, provided no charge is made by the charterer to the persons transported, is subject to tax if the amount paid represents a per capita charge of more than 35 cents for each person actually transported.

The charterer of a conveyance who sells transportation to other persons must collect and account for the tax with respect to all amounts paid to him for transportation which are in excess of 35 cents. In such case, no tax will be due on the amount paid for the charter of the conveyance, but it shall be the duty of the owner of the conveyance to advise the charterer of his liability for collecting and accounting for the tax.

* * * * *

SEC. 130.54. *Payments Not Subject to Tax.*— In addition to the payments specifically exempt from tax, as to which see sections 130.60 to 130.63, the following are examples of transportation payments not subject to tax:

* * * * *

(*h*) *Miscellaneous charges.*— * * *

* * * * *

(5) Charges in connection with the charter of a land, water, or air conveyance for the transportation of persons, such as for parking, icing, sanitation, "layover" or "waiting time", movement of equipment in deadhead service, dockage, wharfage, etc.

* * * * *

SEC. 130.59. *Charges Not Exceeding 35 Cents.*— * * *

* * * * *

An amount paid for the charter of a car, train, motor vehicle, aircraft, or boat is exempt from the tax, if the payment represents a per capita charge of 35 cents or less for each person actually transported.

* * * * *

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IN THE

Supreme Court of the United States

October Term, 1956
No. 442

TWENTIETH CENTURY-FOX FILM CORPORATION, a Corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER.

Argument.

This reply brief is for the limited purpose of pointing out two particular incorrect and misleading statements in respondent's brief in opposition.

Respondent states that when Section 3469 of the 1939 Internal Revenue Code was enacted the term "transportation" had already acquired a well developed meaning through its use in the Motor Carrier Act of 1935 and the Civil Aeronautics Act of 1938. (Resp. Br. 5). Although this statement is more properly addressed to the merits of the cause, it also violates all accepted rules of statutory construction. It is well established that separate acts on distinct subjects will not be read together. [*Walling v. Portland Terminal Co.*, 330 U. S. 148, 150, 67 Sup. Ct. 639; 91 L. ed. 809, 812 (1947); *Northern Pac. Ry. Co. v. United States,* 156 F. 2d 346 (7th Cir., 1946), aff'd 330 U. S. 248; 67 Sup. Ct. 747, 91 L. ed. 876 (1947).]

It has been specifically held that the meaning of "transportation" in the Interstate Commerce Act has "slight force, if any" in determining the meaning of the same term in the Natural Gas Act. [*Federal Power Commission v. East Ohio Gas Co.*, 338 U. S. 464, 470, fn. 9, 70 Sup. Ct. 266, 94 L. ed. 268, 276, fn. 9 (1950).]

Respondent further states that taxpayer's prime purpose in chartering airplanes from Mantz was to have its employees carried from the place where they were picked up to other localities in order to enable the employees to perform their functions. (Resp. Br. 7.) Respondent's gratuitous conception of what was taxpayer's prime purpose in chartering these flights has no support in the record. To the contrary the facts as stipulated and found clearly set forth that the *purpose* of each flight involved was either actual aerial photography or aerial observation. (Pet., App. C. pp. 12-15.) This is not a case, therefore, as respondent states, of working while traveling but one of working from the air, without travel being any material part of such work.

Concisely stated, petitioner's position is that the sole purpose of the flights in question was aerial photography or observation and that such movement in the air does not constitute "transportation" as that term is commonly understood and as it is used in Section 3469 of the 1939 Internal Revenue Code.

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